United Nations A/HRC/WGAD/2018/9

General Assembly

Distr.: General
5 June 2018

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 9/2018 concerning Kem Sokha (Cambodia)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 17 January 2018, the Working Group transmitted to the Government of Cambodia a communication concerning Mr. Kem Sokha. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Mr. Kem Sokha is a 64-year-old Cambodian national who resides in Phnom Penh. He is the President of the Cambodia National Rescue Party, which used to be the main political opposition party in the country before its dissolution.

5. On 3 September 2017, at 12.35 a.m., at least 100 officers from the municipal and military police (known as the gendarmerie) conducted a raid on Mr. Kem Sokha's residence in Phnom Penh. The source states that the police were armed with automatic assault rifles and sealed off all road access to Mr. Kem Sokha's house.

6. The source alleges that the officers did not show a warrant or any other decision by a public authority. Instead, they warned Mr. Kem Sokha's guards that they would be "destroyed" if they did not open the door. The source claims that the armed military police forcibly stormed into the residence and dragged Mr. Kem Sokha to the ground floor. He was handcuffed and escorted towards an unmarked sport utility vehicle. He was then taken into custody and transported to Trapaing Thlong Prison (Correctional Centre 3), located in Tboung Khmum Province, on the border with Viet Nam.

7. The source reports that on the morning of 3 September 2017, after Mr. Kem Sokha had been arrested and taken to prison, the Deputy Prosecutor of Phnom Penh Municipal Court issued an arrest warrant. On 4 September 2017, Mr. Kem Sokha was questioned for over four hours at Trapaing Thlong Prison by a team of three prosecutors from Phnom Penh Municipal Court.

8. On 5 September 2017, prosecutors from Phnom Penh Municipal Court charged Mr. Kem Sokha with treason under article 443 (on conspiracy with a foreign power) of the Criminal Code. That charge relates to a speech that he had delivered in Australia in 2013, in which he had discussed his efforts to promote democratic change in Cambodia with the support of foreign experts. According to the source, article 443 of the Criminal Code states that conspiracy with a foreign power is the act of having a secret agreement with a foreign State or its agents, with a view to fomenting hostilities or acts of aggression against Cambodia. It is punishable by a prison term of 15–30 years.

9. The source alleges that Mr. Kem Sokha was arrested in breach of his parliamentary immunity. The authorities claim that he was arrested in accordance with article 80 of the Constitution and article 12 of the Law on the Status of National Assembly Members. These provisions allow the authorities to arrest, detain or charge members of parliament if they are caught committing a crime in flagrante delicto, despite their parliamentary immunity. The authorities assert that, despite the fact that the alleged crime was committed in 2013, it is still considered to be flagrant because the video of the speech has remained available online.

10. On 6 September 2017, the investigating judge of Phnom Penh Municipal Court issued an order for the pretrial detention of Mr. Kem Sokha. On 26 September 2017, during a closed hearing, the Court of Appeals in Phnom Penh ruled that his pretrial detention had been legal, despite his parliamentary immunity, and denied him bail. The hearing was boycotted by his legal team due to the refusal by the authorities to transport the defendant to Phnom Penh to attend the court proceedings. The Court of Appeals issued a statement to the effect that Mr. Kem Sokha's presence in the courtroom was unnecessary as it was not an evidentiary hearing.

11. On 31 October 2017, the Supreme Court in Phnom Penh upheld the Court of Appeal ruling and refused to grant bail to Mr. Kem Sokha. The Supreme Court reasoned that his release would be detrimental to national security and his own safety. Once again, the authorities refused to transport him to Phnom Penh for the hearing.

12. Mr. Kem Sokha was previously the subject of an urgent appeal dated 8 September 2017.[1] The Working Group regrets that no response has been received from the Government to that communication.

Background information

13. The source provided information regarding the context in which Mr. Kem Sokha is being detained. In particular, the source refers to the prosecution and imprisonment of other individuals in Cambodia in recent years, which suggests that the charge against Mr. Kem Sokha under article 443 of the Criminal Code is politically motivated.

14. According to the source, the Government is concerned that a "colour revolution" could occur in Cambodia, and the authorities have imprisoned at least one person on charges of incitement to commit offences under articles 494 and 495 of the Criminal Code after he had called for a colour revolution in a social media post in 2015. The source notes that the Prime Minister of Cambodia recently stated, in reference to opposition politicians, that more rebels intent on staging a colour revolution could be arrested.[2]

15. Moreover, since July 2015, attacks against Cambodia National Rescue Party lawmakers and their supporters, mainly through arbitrary detention, imprisonment and judicial harassment, have intensified. The source claims that these acts were committed due to the ruling Cambodian People's Party's concern over its election prospects in the upcoming general election in July 2018. For example, on 21 July 2015, three Cambodia National Rescue Party members were sentenced to 20 years' imprisonment on charges of leading an insurrectionary movement under article 459 of the Criminal Code. Another eight Cambodia National Rescue Party members and supporters were each sentenced to seven years' imprisonment on charges of participating in an insurrectionary movement under articles 456 and 457 of the Criminal Code. Furthermore, on 26 October 2015, two members of parliament from the Cambodia National Rescue Party were beaten and seriously injured outside the National Assembly. Three officers of the Royal Cambodian Armed Forces, later discovered to be members of the Prime Minister's personal bodyguard, were arrested for the assault and served one year of their four-year suspended sentence.

16. According to the source, the authorities had also previously filed politically motivated charges against the former President of the Cambodia National Rescue Party, Mr. Sam Rainsy. Mr. Sam Rainsy has been in self-imposed exile since October 2015, after Phnom Penh Municipal Court issued a warrant for his arrest in connection with a defamation case filed by the Foreign Minister in 2008 that was reopened. On 16 November 2015, the National Assembly voted to strip Mr. Sam Rainsy of his status as a lawmaker, and revoked his parliamentary immunity. In addition to the 2008 defamation case, Mr. Sam Rainsy has been charged in seven new cases. In four of those cases, the courts have already convicted him in absentia. A travel ban, which had previously been imposed on him by the Government, was lifted on 14 June 2017.

17. Similarly, on 30 October 2015, Mr. Kem Sokha was stripped of his position as First Vice-President of the National Assembly in a vote boycotted by lawmakers from the Cambodia National Rescue Party. On 9 September 2016, he was sentenced in absentia to five months' imprisonment for failing to appear in court as a witness in a case against two other members of parliament from the Cambodia National Rescue Party. He was subsequently pardoned on 2 December 2016. In order to avoid arrest, he was confined to Cambodia National Rescue Party headquarters in Phnom Penh during the period 26 May 2016–3 December 2016 (except when he briefly left the headquarters on 5 October 2016 to register to vote in the June 2017 local commune elections). Police officers, army personnel,

[1] The urgent appeal was sent by the Special Rapporteur on the situation of human rights in Cambodia. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23334.

[2] According to the source, the Prime Minister of Cambodia made this statement on 2 October 2017. "Colour revolution" is a term that has been widely used to describe various pro-democracy movements that developed in several former Soviet republics beginning in the early 2000s.

armoured vehicles and helicopters were deployed around Cambodia National Rescue Party headquarters in Phnom Penh for many days.

18. In October and November 2016, two other members of parliament from the Cambodia National Rescue Party and a senator from the Sam Rainsy Party were prosecuted and convicted over comments that were considered to directly impact upon the popularity and public perception of the ruling Cambodian People's Party and the Prime Minister. Their sentences ranged from 18 months' to seven years' imprisonment.

19. The source adds that, in February 2017, the Government targeted the Cambodia National Rescue Party and its leadership by passing amendments to the Law on Political Parties, ahead of the June 2017 commune elections. The amendments allow the authorities to dissolve political parties if their leaders hold criminal convictions. The Law also prohibits political parties from carrying out activities that affect the security of the State or that would incite others to break up national unity. Further amendments to the Law on Political Parties in July 2017 allow for the dissolution of political parties that use the voice, image, written documents or activities of a convicted criminal.

20. On 11 September 2017, the National Assembly, under the control of the ruling party, voted during an extraordinary plenary session boycotted by lawmakers from the Cambodia National Rescue Party to allow the authorities to continue their cases against Mr. Kem Sokha.

21. On 16 November 2017, the Supreme Court dissolved the Cambodia National Rescue Party and banned 118 of its senior members from participating in politics for five years. The Party's 55 National Assembly seats were redistributed to unelected lawmakers from parties aligned with the Government, including 11 seats that were redistributed to the ruling Cambodian People's Party. The Cambodia National Rescue Party previously held more than 5,000 commune council seats (won in the local commune elections on 4 June 2017), but those were redistributed among six political parties, with 4,548 seats going to the ruling party.

22. The source notes that, as a result of the intensified crackdown, including the arrest of Mr. Kem Sokha and a series of threats against opposition members, about half of the members of parliament from the Cambodia National Rescue Party (including most of its leadership) fled Cambodia.

Submissions on arbitrary deprivation of liberty

23. The source submits that Mr. Kem Sokha's ongoing deprivation of liberty is arbitrary according to categories I, II and III. In relation to category I, the source submits that the authorities failed to invoke a legal basis for his detention, thus rendering it arbitrary. Mr. Kem Sokha was not informed upon arrest of the reasons for his arrest, contrary to articles 9 (2) and 14 (3) (a) of the Covenant.

24. In relation to category II, the source recalls that, during Mr. Kem Sokha's speech to the Cambodian diaspora in Australia in 2013, he discussed efforts to promote democratic change in Cambodia with the support of experts from the United States of America. He explained the role of the Cambodian political opposition and his plans to strengthen it through training and advice from foreign experts, public communication, media work and the organization of public gatherings and protests in order to win the general election. The source submits that, by delivering that speech and posting the corresponding video online, Mr. Kem Sokha exercised his rights guaranteed under article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. Moreover, the source notes that article 41 of the Constitution guarantees Cambodian citizens the freedom to express their personal opinions and the freedom of publication, provided that the exercise of those freedoms does not affect the customs and traditions of society, public order and national security.

25. In addition, the source argues that Mr. Kem Sokha's deprivation of liberty results from the exercise of his right to take part in the government of his country, and the right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant. As the President of the main political

opposition party (the now-dissolved Cambodia National Rescue Party), Mr. Kem Sokha has been deprived of his liberty for reasons based on his political opinion, contrary to article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant, which ensure equality before the law.

26. The source asserts that Mr. Kem Sokha's detention is arbitrary under category III, as his rights to due process, to a fair trial, and to be presumed innocent until proved guilty have not been respected, contrary to article 11 (1) of the Universal Declaration of Human Rights and articles 9 (2) and 14 (2) and (3) of the Covenant. He was not informed of the charges against him until many hours after his arrest on 3 September 2017. The source refers to a statement made by the United Nations High Commissioner for Human Rights on 4 September 2017, in which he voiced concern that numerous public statements by the Prime Minister and high-ranking officials about Mr. Kem Sokha's supposed guilt breached the presumption of innocence and the right to a fair trial to which he was entitled under Cambodian and international human rights law.[3]

Further information from the source

27. On 15 February 2018, the source provided an update on Mr. Kem Sokha's situation. On 1 February 2018, the Court of Appeal in Phnom Penh rejected his application for bail, citing security concerns, the flight risk and the possibility that he would commit further acts of treason.

28. In addition, the source alleges that Mr. Kem Sokha's right to a fair trial has been violated on several occasions since its initial communication to the Working Group. On 7 February 2018, Phnom Penh Municipal Court rejected his request that a representative of the Government of the United States be called as a witness in his case. According to the source, the prison authorities have also hampered the work of Mr. Kem Sokha's lawyers, who are not allowed to bring their own pens and paper to meetings with him. When paper is provided by the prison authorities, it is taken away from the lawyers at the end of meetings. Prison officials are present during Mr. Kem Sokha's meetings with his lawyers and his wife, and monitor their conversations. The source states that concerns are mounting that the legal proceedings against Mr. Kem Sokha could be intentionally delayed until after the Cambodian general election, which is scheduled for 29 July 2018.

29. The source also alleges that Mr. Kem Sokha's conditions of detention violate international human rights norms. According to the source, surveillance cameras have been installed in his cell and the lights are kept on all night. Only his lawyers and wife have been authorized to visit him in prison; requests by other persons to visit have been rejected. He suffers from severe pain from a rotator cuff tear in his shoulder, high blood pressure and hyperglycaemia, but has been denied access to independent and qualified physicians. On 9 February 2018, his lawyers filed a petition with the Supreme Court to seek his release on bail so that he can receive urgent medical treatment for his shoulder injury.

Response from the Government

30. On 17 January 2018, the Working Group transmitted the source's allegations to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 19 March 2018 about Mr. Kem Sokha's current situation, including any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds invoked by the authorities to justify his detention, and the compatibility of his detention with the obligations of Cambodia under international human rights law. On 29 January 2018, the Permanent Mission of Cambodia to the United Nations Office and other international organizations in Geneva acknowledged receipt of that communication.

31. On 26 February 2018, the Working Group sent the updated information provided by the source to the Government. The Government was requested to comment on the

[3] United Nations, "Comment by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein on arrest of Cambodian opposition leader Kem Sokha", 4 September 2017.

allegations as part of its response to the Working Group's initial communication of 17 January 2018 within the deadline of 19 March 2018.

32. The Working Group regrets that it did not receive a response from the Government to either of its communications. The Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

33. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

34. In determining whether Mr. Kem Sokha's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). The Government can meet this burden of proof by producing documentary evidence in support of its claims.[4] In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

35. The source alleges that Mr. Kem Sokha was arrested on 3 September 2017 without an arrest warrant or other decision by a public authority. According to the source, an arrest warrant was not issued by the Deputy Prosecutor of Phnom Penh Municipal Court until later that morning, after Mr. Kem Sokha had already been taken into custody. The Government could have challenged that allegation by presenting evidence of the time and date of issue of the warrant, but did not do so. Accordingly, the Working Group finds that Mr. Kem Sokha was arrested without an arrest warrant, and was not informed at that time of the reasons for his arrest, in violation of article 9 (2) of the Covenant. As the Working Group has previously stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant (see, for example, opinions No. 75/2017 and No. 46/2017).[5] As discussed below, the Working Group does not consider that Mr. Kem Sokha was arrested in flagrante delicto, which might have obviated the need for an arrest warrant.

36. Furthermore, the source alleges that Mr. Kem Sokha was arrested and detained in violation of his parliamentary immunity, which he held as a member of the National Assembly. Given the lack of response from the Government in this case, the Working Group takes it as established that he did in fact have such immunity at the time of his arrest and detention on 3 September 2017.[6]

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[4] See opinion No. 41/2013, in which it is noted that the source of a communication and the Government do not always have equal access to the evidence, and frequently the Government alone has the relevant information. In that case, the Working Group recalled that, where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out": *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at para. 55, p. 661.

[5] The source also argued that Kem Sokha was not informed of the charges against him until many hours after his arrest on 3 September 2017, in violation of articles 9 (2) and 14 (3) (a) of the Covenant. However, the Working Group considers that it does not have sufficient information to determine whether this violated the requirement under these articles of being "promptly" informed of the charges.

[6] In the urgent appeal dated 8 September 2017 (see para. 12 above), it was stated that, on 5 September, the National Assembly spokesperson had declared that the National Assembly had received a report from the Chief Prosecutor and would open a session soon to discuss the lifting of Kem Sokha's immunity and that the Permanent Committee of the National Assembly had met on 7 September and decided to convene a plenary session on Monday 11 September. This supports the Working Group's conclusion that Kem Sokha's immunity had not been withdrawn at the time of his arrest and detention.

37. The Working Group recalls that, under article 9 (1) of the Covenant, no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. Therefore, for deprivation of liberty to be considered to be lawful and not arbitrary, established legal procedures and guarantees must be respected, including in relation to the withdrawal of parliamentary immunity. In a recent opinion, the Working Group set out the principles that it applies in considering whether an individual has been detained in violation of parliamentary immunity, stating that the purpose of parliamentary immunity and the procedure for withdrawing it prior to the detention or prosecution of lawmakers is to protect the legislative process from judicial abuses. Against that backdrop, in countries whose laws establish specific grounds and a special procedure for the deprivation of liberty and/or prosecution of lawmakers, those standards specify such grounds and in accordance with such procedure as are established by law. When the legal order requires the withdrawal of immunity as a precondition for depriving a person of liberty, that requirement must be observed. Once immunity has been withdrawn, the authorities are empowered to order a person's detention.[7]

38. According to the source, the authorities in Cambodia claim that they did not need to withdraw Mr. Kem Sokha's parliamentary immunity prior to his arrest and detention because he had been arrested in flagrante delicto for the offence of treason. The authorities assert that, despite the fact that the alleged crime was committed in 2013, it is still considered to be flagrant because the video of the speech has remained available online. The Working Group cannot agree with this reasoning. In its jurisprudence, the Working Group has consistently found that an offence is flagrant if the accused is either apprehended during the commission of a crime or immediately thereafter, or is arrested in hot pursuit shortly after a crime has been committed.[8] In the present case, the police reportedly stormed Mr. Kem Sokha's residence in the middle of the night, and brought a charge against him for a speech he had delivered in Australia in 2013. In the view of the Working Group, Mr. Kem Sokha was clearly not arrested in flagrante delicto.

39. The Working Group concludes that, by failing to issue an arrest warrant informing Mr. Kem Sokha of the reasons for his arrest, and failing to withdraw his parliamentary immunity prior to his arrest and detention, the Government has not taken the necessary steps to establish a legal basis for his detention. His deprivation of liberty is therefore arbitrary under category I.

40. In addition, the source argues that Mr. Kem Sokha was detained solely for exercising his right to freedom of opinion and expression and his right to take part in the conduct of public affairs. The Working Group considers that the source has established a credible prima facie case based on the following facts. Mr. Kem Sokha is charged with treason for having delivered a speech in Australia in 2013 and having posted the corresponding video online. He had delivered the speech in order to present his strategies for promoting democracy in Cambodia. This included seeking the support of experts from the United States in the form of training and advice, and other means of ensuring electoral success through public communication and media outreach, and the organization of public gatherings and protests.

41. In the absence of any alternative explanation from the Government, the Working Group considers that Mr. Kem Sokha's speech in 2013 and his subsequent posting of a recording of it online, clearly fall within the boundaries of the freedom of opinion and expression protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. The Working Group recalls that the holding and expression of opinions, including those which are critical of, or not in line with, official government policy, is protected under international human rights law. Importantly, there is nothing to suggest that Mr. Kem Sokha behaved in a violent manner or in any way incited his supporters to commit acts of violence. He was peacefully exercising his rights under the Universal Declaration of Human Rights and the Covenant and has been arrested and

[7] See opinion No. 36/2017, para. 81.

[8] Ibid., para. 85. See also opinions No. 53/2014, para. 42; No. 46/2012, para. 30; No. 67/2011, para. 30; and No. 61/2011, paras. 48–49; and E/CN.4/2003/8/Add.3, paras. 39 and 72 (a).

detained for doing so. His actions were those of an opposition politician, and the peaceful exercise of these rights must be protected if opposition parties are to continue to perform their role in Cambodia.

42. The Working Group finds that the permitted restrictions on the freedom of expression under article 19 (3) of the Covenant do not apply in the present case. The burden is on the Government to show that prosecution of Mr. Kem Sokha on a charge of treason is a necessary, reasonable and proportionate response in protecting national security or public order, and it has not done so. In any event, in its resolution 12/16, the Human Rights Council calls on States to refrain from imposing restrictions that are not consistent with international human rights law, including restrictions on: discussion of government policies and political debate; reporting on human rights; engaging in peaceful demonstrations; and expression of opinion and dissent. In paragraph 23 of its general comment No. 34 (2011) on the freedoms of opinion and expression, the Human Rights Committee indicates that States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Article 19 (3) may never be invoked as a justification for the muzzling of any advocacy of multiparty democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19.

43. The Working Group wishes to make further observations on article 443 of the Cambodian Criminal Code, the provision under which Mr. Kem Sokha has reportedly been charged with treason. According to the source, article 443 defines conspiracy with a foreign power as the act of having a secret agreement with a foreign State or its agents, with a view to fomenting hostilities or acts of aggression against Cambodia, and states that the offence is punishable by a prison term of 15–30 years. It is unclear how a public speech on promoting democracy in Cambodia and the posting of a video of that speech online would fall within this definition.

44. Moreover, the Working Group has previously considered the application of similar national security and public order provisions in the context of other countries.[9] In its jurisprudence, the Working Group has consistently found that vague and overly broad provisions that could result in penalties being imposed on individuals who had merely exercised their rights to freedom of opinion and expression cannot be regarded as being consistent with the Universal Declaration of Human Rights or the Covenant. The Working Group considers that article 443, particularly the part on fomenting hostilities or acts of aggression, is so vague and imprecise as to be inconsistent with international human rights law, and calls upon the Government to bring this provision into line with its obligations under the Covenant.

45. In addition to the Working Group's findings, there is widespread concern within the international community about the application of criminal law in Cambodia to restrict the exercise of human rights. That concern is reflected in at least 14 of the recommendations contained in the 2014 report of the Working Group on the Universal Periodic Review on Cambodia, several of which relate to the review and repeal of provisions of the Criminal Code that are not aligned with the obligations of Cambodia under the Covenant, and to the protection of opposition party members.[10] Moreover, in its resolution 36/32, the Human Rights Council expressed serious concern over the deterioration of the civil and political environment in Cambodia due to the chilling effects of judicial prosecutions and other actions against members of political parties, civil society and the media, in particular the recent arrest and detention of Mr. Kem Sokha, and called upon the Government to guarantee the right to freedom of expression.[11]

[9] See, e.g., opinions No. 26/2013, No. 27/2012 and No. 46/2011.

[10] See A/HRC/26/16, paras. 118.15–16, 118.18–21, 118.104, 118.106–109, 119.22, 119.24 and 119.27.

[11] See also A/HRC/37/64, para. 5. Furthermore, on 21 March 2018, 45 States issued a statement during the thirty-seventh session of the Human Rights Council on the human rights situation in Cambodia, which reportedly included expressions of concern about Kem Sokha's ongoing detention, and called upon the Government to immediately release him.

46. Furthermore, the Working Group finds that, at the time of delivering the speech in 2013, Mr. Kem Sokha held a leadership role in the main political opposition party and outlined in the speech his plans to strengthen the political system in Cambodia. His detention clearly resulted from the exercise of his right to take part in the government of his country, and the right to take part in the conduct of public affairs under article 21 (1) of the Universal Declaration of Human Rights and article 25 (a) of the Covenant. He has been deprived of his liberty based on his political or other opinion, contrary to articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant, and in violation of his rights to equality before the law and equal protection of the law.

47. The Working Group concludes that Mr. Kem Sokha's deprivation of liberty resulted from the exercise of his rights to freedom of opinion and expression, and the right to take part in the government of his country and the conduct of public affairs, and was contrary to articles 19 and 21 (1) of the Universal Declaration of Human Rights and articles 19 and 25 (a) of the Covenant. His deprivation of liberty is therefore arbitrary under category II.

48. Given its finding that the deprivation of liberty of Mr. Kem Sokha is arbitrary under category II, the Working Group wishes to emphasize that he should face no trial in the future. However, it appears from the information presented by the source that the trial is proceeding against Mr. Kem Sokha, generating concern that it could be intentionally delayed until after the general election in Cambodia in July 2018.

49. The Working Group considers that the information provided by the source discloses several violations of Mr. Kem Sokha's right to a fair trial. The Working Group recalls that, according to article 9 (3) of the Covenant, pretrial detention should be the exception rather than the rule, and as short as possible. In this case, Mr. Kem Sokha has been held in pretrial detention for nearly eight months since his arrest on 3 September 2017. His applications for bail have been rejected on at least three occasions, that is, on 26 September 2017 (refusal of bail by the Court of Appeal), 31 October 2017 (Supreme Court upholds the Court of Appeal ruling refusing bail), and 1 February 2018 (refusal of bail by the Court of Appeal). A further bail application was filed with the Supreme Court on 9 February 2018, citing the need for Mr. Kem Sokha to receive urgent medical treatment. However, the Working Group has no further information on the outcome of that petition.

50. According to the source, the authorities refused to produce Mr. Kem Sokha before the courts during the consideration of the lawfulness and necessity of his detention on 26 September 2017 and 31 October 2017. Although these were not evidentiary hearings, he had the right to appear in person. The Working Group has confirmed that courts should guarantee the physical presence of the detainee, especially for the first hearing of the challenge to the lawfulness of the detention, and every time that the detainee requests to appear. The Working Group considers that any authorities who fail in their duty to produce a detainee without unreasonable delay should be sanctioned as a matter of criminal and administrative law.[12] Moreover, in paragraphs 34 and 42 of its general comment No. 35 (2014) on liberty and security of person, the Human Rights Committee states that every detainee has the right to appear physically before the judge or other officer authorized by law to exercise judicial power. The physical presence of detainees at the hearing may serve the inquiry into the lawfulness of detention, and serves as a safeguard for the right to security of person and the prohibition against torture and other cruel, inhuman or degrading treatment.[13]

51. While it appears that the courts conducted an individualized review of Mr. Kem Sokha's case, including in relation to his flight risk and risk of reoffending,[14] the Government has not provided any indication that the courts considered alternatives to

[12] United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 11 and guideline 10.

[13] See also the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 32 (2) and 37.

[14] It should be noted that the Supreme Court's finding that Kem Sokha's release would be detrimental to his safety is not a legitimate ground for detention (see para. 11 above). See also A/HRC/27/48, paras. 78–79.

detention in this case. In paragraph 38 of its general comment No. 35 (2014) on liberty and security of person, the Human Rights Committee states that, pursuant to article 9 (3) of the Covenant, courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, such as reporting to the police or surrendering a passport, would render detention unnecessary. Given that Mr. Kem Sokha is a high-profile political leader, it seems unlikely that he would be able to hide in Cambodia or leave the country easily. In addition, he is suffering from serious medical conditions, including a shoulder injury, high blood pressure and hyperglycaemia. As the Working Group has previously stated, when a person remanded in pretrial detention suffers from a serious medical condition, this factor should be taken into account by the courts, and alternatives to custodial measures should at least be considered.[15] As noted earlier, the Working Group considers that this case should not proceed to trial. However, if Mr. Kem Sokha is to be tried, the trial must occur within a reasonable time, otherwise he is entitled to release under article 9 (3) of the Covenant. He is also entitled to be tried without undue delay under article 14 (3) (c) of the Covenant. If, as the Government has reportedly asserted, his alleged crime is indeed considered to be flagrant, it is difficult to understand why lengthy pretrial detention is necessary in the present case.

52. In addition, the Working Group considers that Mr. Kem Sokha has not been afforded his rights under article 14 of the Covenant. According to the source, the prison authorities have not allowed him to meet with his lawyers in conditions that respect the confidentiality of their communications. His lawyers are required to leave paper provided by the prison authorities behind at the end of meetings, and prison officials are present during, and monitor, conversations between him and his lawyers. This violates his right to adequate time and facilities for the preparation of his defence, and to communicate with counsel of his choosing under article 14 (3) (b) of the Covenant.

53. The source also reported that, on 7 February 2018, Phnom Penh Municipal Court rejected Mr. Kem Sokha's request that a representative of the Government of the United States be called as a witness. He is alleged to have conspired against the Government of Cambodia with a foreign power, presumably with the United States, given his reference to experts from that country in his 2013 speech. As such, the ability to call a representative of the Government of the United States as a witness appears to be of great importance to his case. The refusal to allow the witness to be called is a prima facie violation of article 14 (3) (e) of the Covenant, which the Government has not contested.

54. The Working Group has considered the source's argument that Mr. Kem Sokha has not been afforded the presumption of innocence under article 14 (2) of the Covenant. The source referred to concerns expressed by the United Nations High Commissioner for Human Rights in relation to public statements made by the Prime Minister and other officials about Mr. Kem Sokha's supposed guilt. Neither the source nor the quoted statement from the High Commissioner (see para. 26 above) specifically refer to the content of those statements, and the Working Group is unable to find a violation of the presumption of innocence without such information. However, the Working Group takes this opportunity to remind the Government that, in paragraph 30 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee states that it is the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused.

55. The Working Group has noted the source's allegations that the conditions in which Mr. Kem Sokha is being detained do not meet international standards. The Government could have challenged these allegations, but did not do so. The Working Group refers, in particular, to the installation of surveillance cameras in his cell and the practice of keeping his cell lights on all night. Moreover, he has been allowed to receive visits only from his lawyers and wife, and not from other persons who have sought to visit him in prison. This treatment falls short of the standards in rules 43 (1) (c) and 58 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

[15] See opinion No. 62/2017, para. 45.

56. The Working Group concludes that the non-observance of the international norms relating to the right to a fair trial in this case is of such gravity as to render Mr. Kem Sokha's deprivation of liberty arbitrary under category III.

57. The Working Group is of the view that Mr. Kem Sokha's arrest and detention was politically motivated. The source presented ample evidence, which was not contested by the Government, of the arrest, detention, prosecution and conviction of political opponents in what appears to be an escalating trend in Cambodia of suppression of criticism of the Government ahead of the National Assembly election in July 2018.[16] The Working Group notes that Mr. Kem Sokha's prosecution is taking place against a background of the dissolution of his party, the Cambodia National Rescue Party, and of amendments to laws that place restrictions on political parties and allow for their dissolution in a broader range of circumstances. The Working Group considers that Mr. Kem Sokha has been deprived of his liberty on discriminatory grounds, namely his political or other opinion. His deprivation of liberty aimed towards and resulted in ignoring the equality of human beings and is therefore arbitrary under category V.

58. The Working Group wishes to express its serious concern about Mr. Kem Sokha's health. The source reports, and the Government has not denied, that he suffers from severe pain from a rotator cuff tear in his shoulder, high blood pressure and hyperglycaemia, but has been denied access to independent and qualified physicians. According to article 10 (1) of the Covenant and rules 1, 24, 27 and 118 of the Nelson Mandela Rules, all persons deprived of their liberty must be treated with humanity and with respect for their inherent dignity, including enjoying the same standards of health care that are available in the community. In particular, rule 27 (1) requires that all prisons ensure prompt access to medical attention in urgent cases, and that prisoners who need specialized treatment or surgery be transferred to specialized institutions or civil hospitals. Given that Mr. Kem Sokha has now been in detention for nearly eight months, the Working Group calls on the Government to immediately and unconditionally release him, and to ensure that he receives the required medical treatment as soon as possible.

59. The Working Group considers that the present case involves serious human rights violations and has decided to refer it to the Special Rapporteur on the situation of human rights in Cambodia for appropriate action.

60. Finally, the Working Group would welcome an invitation to visit Cambodia in order to engage constructively with the Government in addressing issues of arbitrary deprivation of liberty. Given that the human rights record of Cambodia will be subject to review during the third cycle of the universal periodic review in January 2019, an opportunity exists for the Government to enhance its cooperation with the special procedures of the Human Rights Council, and to bring its laws into conformity with international human rights law.

Disposition

61. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Kem Sokha, being in contravention of articles 2, 7, 9, 10, 11 (1), 19 and 21 (1) of the Universal Declaration of Human Rights and articles 2 (1), 9, 14, 19, 25 (a) and 26 of the Covenant, is arbitrary and falls within categories I, II, III and V.

62. The Working Group requests the Government of Cambodia to take the steps necessary to remedy the situation of Mr. Kem Sokha without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

63. The Working Group considers that, taking into account all the circumstances of the case, in particular the risk of harm to Mr. Kem Sokha's health, the appropriate remedy

[16] In its opinion No. 39/2005, the Working Group found the detention of an elected member of the Cambodian National Assembly to be arbitrary in a case that was similar in several respects to the present case.

would be to release him immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

64. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Kem Sokha, and to take appropriate measures against those responsible for the violation of his rights.

65. The Working Group requests the Government to bring its laws, including article 443 of the Criminal Code, into conformity with the recommendations made in the present opinion and with the commitments made by Cambodia under international human rights law.

66. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on Cambodia for appropriate action.

Follow-up procedure

67. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Kem Sokha has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Kem Sokha;

(c) Whether an investigation has been conducted into the violation of Mr. Kem Sokha's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Cambodia with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

68. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

69. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

70. The Government should disseminate through all available means the present opinion among all stakeholders.

71. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[17]

[*Adopted on 19 April 2018*]

[17] See Human Rights Council resolution 33/30, paras. 3 and 7.